

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-6107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERNICE DUBOSE, et al.,
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,
Defendants-Appellants.

CLAUDIA WALTER, et al.,
Plaintiffs-Appellees,

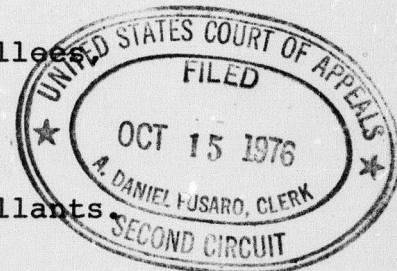
v.

CARLA HILLS, et al.,
Defendants-Appellants.

JANETTE LITTLE, et al.,
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,
Defendants-Appellants.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE PLAINTIFFS-APPELLEES

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QUESTION PRESENTED

Whether the District Court abused its sound discretion in extending the preliminary injunction previously issued to the statewide class of tenants requiring the Secretary of HUD to prospectively implement the operating subsidy program pursuant to the Congressional mandate.

STATEMENT OF THE CASE

Nature of the Case

On September 25, 1975, plaintiffs-appellees, low-income tenants (hereinafter "tenants") residing at Windham Heights Apartments in Willimantic, Connecticut, filed an action against defendant-appellant, Carla Hills, Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD"), and the owner of their Section 236 project in the United States District Court for the District of Connecticut seeking to compel the Secretary to implement the operating cost subsidy program enacted by Congress in the Housing and Community Development Act of 1974. P.L. 93-383, 88 Stat. 633, 12 U.S.C. §1715z-1(f)(3) and (g). (R.l., Complaint).¹

¹References to the record below in this brief refer to the record in Dubose v. Hills, Civil No. H-75-303, unless otherwise stated.

Specifically, the tenants alleged that the Secretary had failed to determine an initial operating expense level for Windham Heights. The tenants also claimed that in approving the \$20.00 monthly rental increase for the project effective October 1, 1975, the Secretary had failed and refused to provide the project owner with additional assistance payments for the operating subsidy. By enacting the operating subsidy provisions, Congress mandated that the Secretary make additional assistance payments to Section 236 project owners to offset justifiable increases in local property taxes and utility costs above the initial operating expense level for each project if the increased operating costs produce a rental charge in excess of 25% to 30% of a tenant's "adjusted monthly income."²

Proceedings Below

After entering a temporary restraining order

² The tenants also attacked HUD's approval of the rent increase for the failure of HUD and the project owner to satisfy federal regulatory requirements and the Due Process Clause of the Fifth Amendment. This issue has not been decided by the District Court and is not before this Court on the instant appeal. Dubose v. Hills, 405 F. Supp. 1277, 1279 and n.10 (D. Conn. 1975) (J.A.).

requiring the Secretary to establish an initial operating expense level at Windham Heights and to implement the operating subsidy program on behalf of all eligible tenants at the project, and following the filing of two additional lawsuits which the District Court consolidated,³ on December 15, 1975, Judge Blumenfeld issued his Ruling on Plaintiffs' Motion for a Preliminary Injunction. Dubose v. Hills, 405 F. Supp. 1277 (D. Conn. 1975) (J.A.). In his opinion Judge Blumenfeld concluded after a thorough review of the legislative history that the operating subsidy program is a mandatory program and preliminarily enjoined the Secretary from refusing to implement it.⁴ Finding that the tenants and the members of their class⁵ would suffer

³ Walter v. Hills, Civil No. H-75-345; Little v. Hills, Civil No. H-75-346. In each of these cases temporary restraining orders similar to the one issued in Dubose, were also issued.

⁴ The nature of the Section 236 program and the nature of the operating subsidy provisions and its funding mechanisms are more fully described infra.

⁵ The classes certified on December 15, 1975, consisted of:

Those family units now residing, or who may at some future time reside at one of the three Section 236 housing projects involved in this lawsuit who pay or will pay more than 30% of their "adjusted family income" for rent as of the effective dates of the rent increases challenged . . .

405 F. Supp., at 1280 (footnote omitted) (J.A.).

irreparable harm and "that the plaintiffs will almost surely succeed in obtaining permanent injunctive relief at the trial on the merits," 405 F. Supp., at 1292 (J.A.)⁶, the District Court ordered the Secretary to pay to the project owners that portion of the approved rental increases attributable to increases in local property taxes and utilities. Id. The additional assistance payments for the operating subsidy were ordered to be made from the "reserve fund," 12 U.S.C. §1715z-1(g), which is comprised of rentals collected by Section 236 project owners in excess of the "basic rental charge." The District Court held that the "reserve fund" could be utilized by HUD without the allocation of contract authority. 405 F. Supp., at 1284-1288 (J.A.). Alternatively, the District Court held that even if contract authority were required to be obligated to use the reserve fund, that the Secretary had abused her discretion in failing and refusing to obligate it. 405 F. Supp., at 1292 (J.A.). The Secretary took no appeal from these

⁶ The District Court concluded that the tenants would suffer irreparable harm if the injunctions were not issued based upon "the nature of the harm they face if such relief [were] denied." 405 F. Supp., at 1292 (J.A.). With the increased rental charges the named plaintiffs in the three cases would have been required to pay from 52% to 92% of their HUD-calculated "adjusted monthly incomes for rent." Id. n.74.

preliminary injunctions since in her own words "[it] affected only the few housing projects involved in these cases." Brief for the Federal Defendants-Appellants (hereinafter "Secretary's Brief"), at 15.

Subsequent to the issuance of these preliminary injunctions, five other similar lawsuits were filed in Connecticut.⁷ As a result of this development plaintiffs in the three named cases, Dubose, Walter, and Little, filed amended complaints seeking to represent a statewide class of plaintiffs. (J.A.). Accordingly, on February 24, 1976, tenants filed their Motion to Amend Class Certification. (J.A.). Judge Blumenfeld reserved decision after argument on March 29, 1976, awaiting submission of data from HUD on the number of Section 236 projects in Connecticut which had received HUD's approval for the implementation of rental increases. The requested data was

⁷ Pleasant v. Hills, Civil No. H-76-26; Morales v. Hills, Civil No. N-76-44; Adams v. Hills, Civil No. H-76-89; Johnson v. Hills, Civil No. N-76-109; and Grundman v. Hills, Civil No. H-76-160. Although the Secretary filed a Notice of Appeal in each of these cases as well, none was directly involved in the proceedings which led to the District Court's Ruling on Plaintiffs' Motion to Amend Class Certification entered on May 27, 1976, from which the Secretary has appealed. The only action taken by the District Court was to consolidate these additional five cases with Dubose, Walter, and Little for trial purposes. Ruling, at 5 (J.A.). Accordingly, a motion to dismiss the appeals in these five cases was granted by this Court on August 17, 1976, since the Secretary has appealed only the present statewide preliminary injunction issued in the Ruling of May 27, 1976.

In support of their motion to dismiss the tenants stated that in Pleasant and Adams the District Court had issued independent preliminary injunctions in their favor respectively on February 9, 1976, and March 31, 1976, from which the Secretary took no timely appeal.

finally submitted to the District Court on May 21, 1976, and on May 27, 1976, the District Court issued its Ruling on Plaintiffs' Motion to Amend Class Certification certifying a private defendant class of 101 Section 236 projects. The amended plaintiff class was defined as:

[a]ll persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase and who pay or will pay more than 30% of their "adjusted family income" for rent as of the date the basic monthly rent was determined for each project.

Ruling, at 5 (J.A.).

In addition, the District Court issued the same preliminary injunctive relief on behalf of the amended plaintiff class as was previously issued, and ordered that the additional assistance payments for operating subsidies be paid to each project owner "commencing with the rental payments due June 1, 1976, or the effective date of the rent increase, whichever is later." Ruling, at 6 (footnote omitted) (J.A.). These payments were ordered to be made no later than July 1, 1976. ⁸ Id.

⁸
This order was amended by the District Court by Order of June 28, 1976 (J.A.) pursuant to the Stipulation of the parties (J.A.) extending the time for compliance until August 1, 1976. That order was amended on August 6, 1976, over the tenants' objection extending the time for compliance until September 15, 1976. Finally, on September 27, 1976, the time for compliance was again extended until October 14, 1976 by the District Court. The tenants' motion for reconsideration of that order is still pending.

Meanwhile, on March 22, 1976, a proposed nationwide class action was instituted against the Secretary of HUD and other HUD officials to compel the Secretary to implement the operating subsidy program. Underwood v. Hills, Civil No.76-0469 (D.D.C.) On June 2, 1976, Judge Pratt in Underwood certified the nationwide class,⁹ but on June 8, 1976, amended his order to exempt the statewide class certified by Judge Blumenfeld in Dubose, Walter, and Little on May 27, 1976 (a copy of which is included as Exhibit A in Supplement to Brief for Plaintiffs-Appellees) (hereinafter "Supplement"). On the same date, the District Court in Underwood granted summary judgment for the plaintiffs and ordered the Secretary to implement the operating subsidy program and make the additional assistance payments "as soon as practicable" back to February 18, 1975, the date on which the Secretary was to have determined the initial operating expense level for all Section 236 projects. See, 12 U.S.C. 1715z-1(g). 414 F. Supp. 526 (D.D.C. 1976).

In light of the final judgment in Underwood, supra, and the amended nationwide class certification exempting the Connecticut tenant class, the Secretary on June 21, 1976, moved

⁹ The June 2, 1976 order, which was issued nunc pro tunc to May 20, 1976, expressly exempted any party to an action in which final judgment was entered, or any member of a class certified prior to the date of the order in any action seeking to compel the Secretary of HUD to implement the operating subsidy program.

to vacate the May 27 Ruling or in the alternative for a stay pending appeal. (R.49, Motion). After a hearing that motion was denied by the District Court on June 28, 1976. (R. 57, Order).

Proceedings in this Court

On July 7, 1976, the Secretary filed a Notice of Appeal in these and other cases (R. 63, Notice),¹⁰ and simultaneously applied to this Court for both a temporary stay and a stay of the District Court's Ruling of May 27, 1976, as amended by its Order of June 28, 1976,¹¹ pending disposition of the appeal. After a hearing both motions were denied by this Court on July 20, 1976 (per Meskill, C. J., Waterman, C. J., and Bartels, D. J.).¹²

Subsequent Proceedings Below

On August 28, 1976, the Secretary again moved in the District Court to vacate and dissolve its statewide

¹⁰ See note 7, supra.

¹¹ See note 8, supra.

¹² On August 17, 1976, the tenants' motion to dismiss the Secretary's attempted appeal in five other cases was granted (per Van Graafeiland, C. J., Kelleher, D. J., and Gagliardi, D. J.). See note 7, supra.

preliminary injunction solely on the basis of the enactment of P.L. 94-378, 90 Stat. 1005, on August 9, 1976, entitled "Department of Housing and Urban Development -- Independent Agencies Appropriation Act 1977."¹³ The Secretary contended that Congress through this new legislation had ratified her position from the beginning.

After oral argument on September 13, 1976, and the submission of briefs by both parties the District Court issued its Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction on September 27, 1976 (a copy of which is included as Exhibit B in the Supplement). After a careful review of the legislative history concerning the proviso¹⁴ in the new legislation, Judge Blumenfeld concluded that the legislative history "[m]akes clear that Congress did not intend to allow the Secretary to fail to implement the operating subsidies program." Ruling, at 11. The court below further held that "that portion of the [reserve] fund necessary to maintain a

¹³ The enactment of P.L. 94-378 followed by six days the enactment of P.L. 94-375, 90 Stat. 1067 (August 3, 1976), entitled "The Housing Authorization Act of 1976." Section 4(a) of P.L. 94-375 amends 12 U.S.C. §1715z-1(n) to continue the Section 236 program until September 30, 1977.

¹⁴ The "proviso," which followed the appropriation of \$2,975,000,000 for the Section 236 and other programs, reads as follows:

Provided, that excess rental charges credited to the Secretary in accordance with Section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

full operating subsidies program in Connecticut must be so allocated. Only in this way will the relief granted by my earlier orders not be 'prejudiced'." Id., at 11 (emphasis in original) (footnotes omitted).¹⁵

SUMMARY OF ARGUMENT

Congress in 1968 enacted the Section 236 housing program, 12 U.S.C. §1715z-1, which was designed "to assist families with incomes so low that they could not otherwise decently house themselves." 12 U.S.C. §1701t. In particular, the program was created "[for] the purpose of reducing rentals for lower income families," by providing several forms of federal subsidies to private landlords to enable them to meet the housing needs of the poor.

In an effort to relieve project owners and tenants from the skyrocketing costs of utilities and property taxes and to maintain appropriate rentals for low-income tenants the Congress in the Housing and Community Development Act of 1974 enacted, inter alia, the operating cost subsidy program, 12 U.S.C. §1715z-1(f)

¹⁵

The Conference Report of the House and Senate added the following express caveat to the proviso in the bill:

The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area.

H. R. Rep. No. 94-1362, 94th Cong., 2d Sess. (1976);
122 Cong. Rec. H 7685.

(3). The statute required the Secretary to determine the initial operating expense level for all Section 236 projects no later than February 18, 1975. The statute also mandates that the Secretary make additional assistance payments for the operating subsidy to offset justifiable costs of property taxes and utilities. This subsidy payment is to be made to project owners on behalf of low-income tenants to prevent them from paying more than 25%-30% of their "adjusted monthly incomes" for rent.

Congress provided two independent mechanisms for funding the operating subsidy program. First, it amended the provisions regulating the use of the "reserve fund," 12 U.S.C. §1715z-1(g), to require that the fund be utilized without the obligation of contract authority for the payment of the subsidy. That statute, as amended by the Housing and Community Development Act of 1974, establishes a comprehensive and self-executing scheme for the use of the fund comprised of excess rental charges collected by the Secretary. That scheme provides both for the contingency that the fund will not be sufficient to cover all operating subsidies and for the contingency that the fund will be more than sufficient.

The second mechanism provided by Congress for funding the additional assistance payments for operating subsidies is through the Secretary's contract authority for the Section 236 program. In addition to the language of subsection (f)(3) Congress has specifically stated that "the Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects." S. Rep. 93-1255, 93rd Cong., 2d

Sess., at 8 (1974).

In extending the provisions of its preliminary injunction previously issued, Dubose, supra, 405 F. Supp. 1277 (D. Conn. 1975), on behalf of the re-certified statewide class of tenants in Connecticut the District Court did not abuse its sound discretion. Judge Blumenfeld correctly found and the Secretary does not contest the fact that the tenants would suffer irreparable harm were the operating subsidy program not implemented. Additionally, the District Court applied the correct legal standard in concluding that the tenants were more than likely to prevail on the merits. (J.A.). Every court to have considered this program has held unequivocally that the Secretary is under a legal duty to fully implement this mandatory program and that expenditure of the reserve fund does not require the obligation of her contract authority. See, e.g. Underwood v. Hills, 414 F. Supp. 526, 531 (D.D.C. 1976). Moreover, the Secretary's claim that the court below committed "a clear mistake of law" is rendered frivolous by virtue of the fact that she failed to appeal the preliminary injunctions issued in the three named cases and in two others in Connecticut.

Moreover, the Secretary's total reliance upon Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974), to support her claim of unfettered discretion is totally misplaced. In Lynn the Court recognized only a very narrow discretion in the Secretary of HUD to refuse to continue funding programs which the Secretary, after an extensive study, had found to be

unworkable and counterproductive in actual operation, unsalvageable by reforms in administration of the programs, and which were operating in a manner that contravened Congressional goals behind the programs. With regard to the operating subsidy program, however, the program would do what Congress intended -- reduce rents for low-income tenants by subsidizing increased operating costs. Moreover, without any factual study of this program or a finding that the program could not be administered in a way that would reduce rents for tenants and financially assist struggling projects, the Secretary simply claims that payment of operating subsidies would interfere with the implementation of other housing programs which she prefers.

Contrary to the Secretary's arguments, Congress has, in fact, consistently expressed its disapproval of the Secretary's continuing failure and refusal to implement the operating subsidy program. In reporting out legislation which, inter alia, has extended the Section 236 program until September 30, 1977, the Senate Committee which authored the operating subsidy program stated that "the reserve [fund] is required to be used for additional operating assistance provisions . . ." and expressed its concern over HUD's failure to implement the program. S. Rep. No. 94-749, 94th Cong., 2d Sess., at 10 (1976). Subsequently Congress refused to enact a rescission bill approving the Secretary's impoundment of the reserve fund, thereby indicating its disapproval of her action. H. Doc. No. 94-558, 94th Cong., 2d Sess. (1976). Finally, the enactment of P.L.

94-378 which allows the reserve fund to be used "in addition to amounts appropriated . . ." is subject to the express Congressional condition that "this action shall not prejudice any suit now or hereafter before the courts in this area," H. Rep. No. 94-1362, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. H 7685, and the District Court in these cases has so found. Dubose v. Hills, supra, Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction (Sept. 27, 1976).

In short, the Secretary's continuing refusal to implement the Congressionally mandated operating subsidy program for low-income tenants and her tireless efforts to deplete the reserve fund for other purposes since the outset of this litigation clearly support Congress' reprimand for HUD's "continuing effort to kill the Section . . . 236 program," S. Rep. No. 94-326, 94th Cong., 1st Sess., at 2 (1975), and the issuance of the statewide preliminary injunction by the District Court..

ARGUMENT

I. THE STATUTORY FRAMEWORK OF THE SECTION 236 PROGRAM.

A. Description of the Section 236 Housing Program.

Congress, in 1968, enacted the Section 236 housing program, 12 U.S.C. §1715z-1, which was designed "to assist families with incomes so low that they could not otherwise decently house themselves." 12 U.S.C. §1701t. In particular, the program was created "[for] the purpose of reducing rentals for lower income

families," 12 U.S.C. §1715z-1(a), by providing several forms of federal subsidies to private landlords to enable them to meet the housing needs of the poor. These subsidies encourage the construction of new housing units and enable landlords to reduce the rental rates charged tenants.

By the terms of Section 236, HUD's implementing regulations,¹⁶ and provisions of the Regulatory Agreement,¹⁷ which each project owner is required to enter into with HUD, all aspects of the operation of Section 236 housing projects are regulated. HUD controls rental rates, rent increase procedures, and the rights and duties of tenants and landlords. Tenants in Section 236 housing pay 25% of their "adjusted monthly incomes"¹⁸ for rent, or they pay the "basic rent,"¹⁹ whichever rental rate is greater. But no tenant pays more than the "fair market rent,"²⁰ 12 U.S.C. §1715z-1(f)(1).

¹⁶ 24 C.F.R. §§236 and 401.

¹⁷ See, a sample Regulatory Agreement between HUD and Section 236 project owner (a copy of which is included as Exhibit C in the Supplement).

¹⁸ Adjusted monthly income is defined in 24 C.F.R. §236.2 as actual income less specified deductions depending on family circumstances.

¹⁹ Basic rent is the minimum rent a project owner would need to collect to cover operating costs, if he were making payments on a mortgage bearing interest at the rate of 1% per annum. 12 U.S.C. §1715z-1(f)(1)(A).

²⁰ Fair market rent is the rent which a project owner needs to collect to cover operating costs, including payments on a mortgage bearing interest at the commercial interest rate. 12 U.S.C. §1715z-1(f)(1)(B).

Section 236 project owners receive substantial monetary benefits from HUD in return for their agreement to be bound by the above restrictions on rental rates and project management. The basic form of financial assistance paid project owners is the periodic interest reduction payment (the production subsidy), or "assistance payment," which equals the difference between the amount a project owner actually pays each month for principal, interest and mortgage insurance and the amount he would pay if his mortgage were bearing interest at a hypothetical 1% interest rate. 12 U.S.C. §1715z-1(c).

In addition to the interest reduction payment, HUD is required by Section 236 to make two kinds of "additional assistance payments." The first is called the "deep subsidy," which HUD pays on behalf of tenants in 20% of the units in Section 236 housing projects constructed after August 22, 1974, who are unable to afford the basic rentals with 25% of their incomes. 12 U.S.C. §1715z-1(f)(2). The Secretary claims that HUD is now making deep subsidy payments to project owners on behalf of qualified tenants.

The other kind of "additional assistance payment" is the "operating subsidy." It was the Secretary's refusal to make the additional assistance payments for operating subsidies, in violation of her mandatory duty under Section 236, that formed the basis of this suit. The operating subsidy provisions require HUD to subsidize increased costs of local property taxes and utilities, and thereby prevent such costs from being passed on

to low-income tenants. To implement the operating subsidy program, the Secretary of HUD is required to determine the initial operating expense level for each Section 236 project,²¹ and to make and to contract to make additional assistance payments to project owners in the amount by which the sum of the cost of utilities and taxes exceeds the initial operating expense level, provided that the increased costs are reasonable and that the payment is not more than the amount required to maintain basic rentals at 25-30% of tenants' incomes.²²

Congress provided two mechanisms for funding the additional assistance payments for operating subsidies. First, it established a reserve fund consisting of all rental charges collected by Section 236 project owners in excess of the basic rental charges. That reserve fund is "to be used by the Secretary to make additional assistance payments" for operating subsidies to offset increased costs of property taxes and utilities. 12 U.S.D. §1715z-1(g). If the balance collected in the reserve fund is adequate to make the additional assistance payments for operating subsidies,

²¹The initial operating expense level is defined as the sum of the cost of utilities and local property taxes payable by the project owner at the time the property was determined by the Secretary of HUD to be fully occupied, 12 U.S.C. §1715z-1(f)(3), which was mandated to be determined for each project no later than February 18, 1975, 12 U.S.C. §1715z-1(g).

²²The plaintiffs in Little v. Hills, *supra*, and other cases filed in Connecticut have alleged and the Secretary concedes that the limitation is established at 25% and the amount of the operating subsidy may be increased to reduce the rent to 25% of "adjusted family income" for tenants who pay their own utility costs. Secretary's Brief, at 7 nn.6 and 7; 12 U.S.C. §1715z-1(f)(3).

then, pursuant to 12 U.S.C. §1715z-1(g), any surplus in the fund is to be credited to the appropriation authorized by 12 U.S.C. §1715z-1(i) and is to be available until the end of the following fiscal year to make interest reduction payments on behalf of Section 236 housing projects. Congress can then appropriate a lesser amount for the interest reduction payments in the next year to reflect the utilization of the surplus in the reserve fund.²³

The second mechanism provided by Congress for funding

²³ In its initial preliminary injunction ruling below, the District Court interpreted the operation of the reserve fund, 12 U.S.C. §1715z-1(g), to require a determination of its adequacy by the Secretary, 405 F. Supp., at 1286, 1293 (J.A. ,), but nevertheless held that the operating subsidy program was a mandatory one and must be implemented by the Secretary of HUD. 405 F. Supp., at 1288. This interpretation of subsection (g) is contrary to that reached by two other district courts which have considered the issue, Underwood v. Hills, 414 F. Supp. 526, 531 (D.D.C. 1976); Battles Farm Co. v. Hills, 414 F. Supp. 521, 526 (D.D.C. 1976); Ross v. Community Services, Inc., 405 F. Supp. 831, 836 (D. Md. 1975), and the tenants' motion for clarification of that aspect of Judge Blumenfeld's opinion is pending before him. See, Dubose, supra, Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction, ____ F. Supp. ____ (D. Conn. Sept. 27, 1976), Slip Opinion, at 11 n.16 (a copy of which is included as Exhibit B in the Supplement).

additional assistance payments for operating subsidies is through the Secretary's "contract authority."²⁴ Section 236 provides in subsection (f)(3) that the Secretary may contract to make additional assistance payments for operating subsidies, and Congress has specifically stated that "the Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects." S. Rep. No. 93-1255, 93rd Cong., 2d Sess., at 8 (1974).

The Secretary can pay operating subsidies directly from the reserve fund without concurrently utilizing her contract authority. But if the reserve fund is inadequate to pay all operating subsidies, the Secretary must still pay full subsidies by using her contract authority. Thus, Congress not only mandated the Secretary of HUD to make operating subsidy payments,

²⁴"Contract authority" is simply the power conferred on the Secretary by statute to enter into contracts on behalf of the government up to an amount of money which Congress has promised to appropriate to cover those contracts. Generally, that promise is made in an authorization for appropriation. "Under the contract authority scheme . . . there are authorizations for future appropriations but also initial and continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of the authorization" Train v. City of New York, 420 U.S. 35, 39 n.2 (1975). "Contract authority . . . permits governmental agencies to incur obligations by entering into long term contracts that will require later appropriations to liquidate the obligations that fall due" Abascal and Kramer, Presidential Impoundment Part I: Historical Genesis and Constitutional Framework, 62 Geo. L. J. 1549, 1550 n.2 (1974).

but provided a comprehensive scheme for funding those payments both from the reserve fund and from the Secretary's available contract authority.

B. HUD's Implementation of the Section 236 Program

As of February 29, 1976, the Department effectively had a balance of unreserved contract authority for implementation of all Section 236 programs of at least \$39.8 million (J.A.). In addition, the excess rental reserve fund as of March 31, 1976, contained at least \$46,328,900 (J.A.).²⁵ HUD plans to use this budget authority for the three Section 236 programs as

²⁵ HUD intends to refund approximately \$18 million of this amount to Section 236 project owners as alleged prior overpayments to the fund (J. A.). However, the validity of this refund is presently being challenged in these cases below where the plaintiffs' motion for a separate preliminary injunction is pending. On September 13, 1976, the tenants and the Secretary entered into a written Stipulation filed in the District Court in which the Secretary agreed not to make any refunds to the private defendant (project owner) class in Connecticut until the pending motion for a preliminary injunction was decided (a copy of this Stipulation is included as Exhibit D in the Supplement). Moreover, the holding in Underwood, supra, 414 F. Supp., at 532, that the Secretary may make such a refund is the subject of the cross-appeal by the nationwide tenant class in Underwood v. Hills, D. C. Cir. Nos. 76-1603, 76-1650.

described below.²⁶

(1) The Production Subsidy Program

Beginning in January, 1973, HUD suspended entering into new production subsidy contracts on the ground that the program suffers from inherent defects that make achievement of its objectives impossible. Commonwealth of Pennsylvania v. Lynn, 163 U.S. App. D. C. 288, 501 F.2d 848 (1974). Nonetheless, HUD plans to use \$27.2 million in contract authority to contract or to amend contracts for production subsidies (J.A.). More particularly, according to the Secretary's affidavits filed below (see, J.A.), this figure consists of: (1) \$20.9 million to honor so-called "bona fide commitments" for production subsidy contracts that were extended before the January, 1973, suspension of the program, see, Lynn, supra, 501 F.2d, at 851 nn. 6 & 10; and (2) \$6.3 million to liquidate "agreements" to increase outstanding contracts. The record below does not make clear whether these "commitments" and "agreements" represent binding legal obligations or whether the "agreements" were entered into or promised before or after institution of the suspension.

²⁶ In fact, there is reason to believe that the Department's figures are at best rough approximations. E.g., compare J. A. (\$2.9 million in contract authority to be used for additional deep subsidies according to first affidavit of Secretary Hills), with J.A. (\$6.8 million to be used according to later affidavit). See also, J.A. . Moreover, the Court may take judicial notice that HUD has found sufficient contract authority to pay operating subsidies pursuant to lower court orders that have been entered against it, despite the fact that the Secretary's calculations leave no additional contract authority available for that purpose at all. See, J.A. .

(2) The Deep Subsidy Program

HUD intends to use (1) another \$5.8 million in contract authority for deep subsidies pursuant to Section 236(f)(2), i.e., for projects that are, to quote that provision, "made subject to a contract under this section after August 22, 1974," and (2) the remaining \$6.8 million of the \$39.8 million in contract authority for deep subsidies to Section 236 projects that, although not finally endorsed or receiving interest reduction payments until after August 22, 1974, had received a commitment by the Department for production subsidies before that date (J.A.).

(3) The Operating Subsidy Program

According to HUD's figures, the Secretary's allocation of unreserved contract authority thus leaves no contract authority at all available for operating subsidies. Moreover, except as ordered by the courts, the Secretary has allowed the revenues in the excess rental reserve fund to lie idle rather than use them to pay operating subsidies. In re-certifying the tenants' classes and certifying a statewide class of Section 236 project owners the District Court extended the terms of its outstanding preliminary injunction on behalf of the statewide tenant class in part because of "the Secretary's continued refusal to implement the operating cost subsidy program for all Section 236 projects." (J.A.). The court in Underwood, supra, at 530 and in Battles Farm Co., supra, at 525, likewise found that

"except as required by court order in lawsuits before this one, the Secretary has made no effort to implement the operating subsidy program, notwithstanding her legal duty to do so."

II. THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION IN ISSUING A PRELIMINARY INJUNCTION AGAINST THE SECRETARY OF HUD REQUIRING HER TO PROSPECTIVELY IMPLEMENT THE OPERATING SUBSIDY PROGRAM ON BEHALF OF THE STATEWIDE TENANT CLASS.

The scope of this Court's review of this appeal by the Secretary is indeed narrow. Unlike all other cases involving the question of the Secretary of HUD's duty to implement the operating subsidy program in which appeals are pending,²⁷ in the instant cases the appeal is from the issuance of a preliminary injunction.

As the Supreme Court recently held speaking through Mr. Justice Rehnquist:

[W]hile the standard to be applied by the District Court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion. Brown v. Chote, 411 U.S. 452, 457 (1973).

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Other cases presently on appeal are appeals by the Secretary from final judgments. Ross v. Community Services, Inc., 405 F. Supp. 831 (D. Md. 1975), appeal pending No. 76-1294 (4th Cir.); Abrams v. Hills, Civil No. 75-3009 JWC (D.D. Cal. Dec. 19, 1975), appeal pending No. 76-2095 (9th Cir.); Underwood v. Hills, 414 F. Supp. 526 (D.D.C. 1976), appeal pending Nos. 76-1603 and 76-1650 (D.C. Cir.); Battles Farm Co. v. Hills, 414 F. Supp. 521 (D.D.C. 1976), appeal pending Nos. 76-1641 and 76-1642 (D.C. Cir.).

Only in Harrison v. Hills, Civil No. 75-938 (W.D. Pa. Oct. 1, 1975), appeal pending No. 76-1641 (3d Cir.), is the appeal pending from the issuance of a preliminary injunction.

Doran v. Salem Inn, Inc., 422 U.S. 922
931-932 (1975).²⁸

Indeed, the recognized standard of appellate review of the issuance of a mandatory preliminary injunction has been recently set forth in this Circuit. In Triebwasser & Katz v. A. T. & T. Co., 535 F.2d 1356, 1358 (2d Cir. 1976), this Court held that the issuance of preliminary injunction "will not be disturbed unless there is an abuse of [the District Court's sound] discretion, . . . or unless there is a clear mistake of law."²⁹

(Citations omitted). See also, San Filippo v. United Bro. of Carpenters & Joiners, 525 F.2d 508, 511 (2d Cir. 1975); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969), cert. denied, 394 U.S. 999 (1969).

With this narrow scope of review in mind we turn to address the issue of whether the District Court "abused its sound discretion" or committed a "clear mistake of law" in the issuance of the statewide preliminary injunction against the Secretary of HUD.

²⁸ See also, United States v. Corrick, 298 U.S. 435 (1936); National Fire Insurance Co. of Hartford v. Thompson, 281 U.S. 331 (1930); State of Alabama v. United States, 279 U.S. 229 (1929); United Fuel Gas Co. v. Public Service Commission of West Virginia, 278 U.S. 322 (1929), all cited with approval by Chief Justice Burger who authored Brown, supra, for a unanimous Court.

²⁹ As noted above the Secretary never appealed the individual preliminary injunctions in these three cases or those issued in Pleasant v. Hills and Adams v. Hills, supra. See, supra, at 4-5 and n.7.

A. The Operating Subsidy Program is a Mandatory Program.

In determining whether operating subsidies are mandatory, this Court should be guided by the presumption against inferring discretion in the Executive Branch to terminate or to refuse to implement programs that Congress has enacted and funded. As has recently been held in an "impoundment"³⁰ case, "there is no longer any doubt that in the absence of express Congressional authorization to withhold funds appropriated for implementation of a legislative program the executive branch must spend all funds. See Impoundment Control Act of 1974, 31 U.S.C. [§§1400 et seq.]." Kennedy v. Mathews, 413 F. Supp. 1240, 1245

³⁰"'[I]mpoundment' is an unauthorized executive refusal to expend appropriated funds, or in the words of section 1011 of the Congressional Budget and Impoundment Control Act of 1974, 'withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities' or 'any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority' Act of July 12, 1974, Pub. L. No. 93-344, §1101, 88 Stat. 297." Abascal and Kramer, Presidential Impoundment Part I: Historical Genesis and Constitutional Framework, 62 Geo. L.J. 1549, 1551, n.6 (1974). That the refusal of the Secretary to spend the reserve fund for operating subsidies is an impoundment is clear both from this definition of impoundment and from the fact that the Comptroller General of the United States has notified Congress that the Secretary has illegally impounded the reserve fund. H. Doc. 94-558, 94th Cong. 2nd Sess. (1976), and letter from Comptroller General to Congress, dated April 20, 1976 (copies of which are included respectively as Exhibits E and F in the Supplement).

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(D. D. C. 1976).³¹ In those cases, although the courts relied primarily on the legislative history and the language of the relevant statutes, they have also recognized that whenever Congress establishes a program and specifies a funding mechanism for that program, Congress is presumed to intend that the program be effectuated and that the available money be expended for that purpose. The burden is on the Executive Branch to prove that Congress has expressly granted it discretion to refuse to implement the program.

For example, in Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973), the Court held that the Secretary of Agriculture could not terminate the Rural Environmental Assistance Program by impounding funds authorized for appropriation for it, nor could he impound funds appropriated for administration of the Federally Assisted Code Enforcement Program. The District Court concluded that if Congress enacted a program and made funds available for it, Congress must have intended that the funds be expended for the program. Legislators and plaintiffs suing to enforce

³¹ See also, e.g., Sioux Valley Empire Electric Ass'n, Inc. v. Butz, 367 F. Supp. 686, 696 (D.S.D. 1973), aff'd, 504 F.2d 168 (8th Cir. 1974) ("It may be true, as argued by the Government that the statute in question does not command the expenditure of all funds appropriated. But this Court cannot accept the proposition that Congress intended to confer upon the Secretary the power to terminate a Congressional program and rechannel the appropriated funds through a separate and distinct Congressional program."); Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clear Water, Inc., 420 U.S. 136 (1975); State of Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973).

legislative intent do not bear the burden of establishing that Congress intended the program to be implemented and the available funds used. Rather, the burden is on the Executive Branch to prove that Congress did not intend for the program to be implemented.

Congress, by authorizing the future obligation of funds by the Secretary of Agriculture, has indicated its intent that the program continue, at least for the period of time authorized. To accept the defendants' position, that absent a mandatory statement that a program be continued or be operated at a certain level the Executive may terminate the program, would be to place a burden on the Congress not contemplated by our Constitution. The Constitution vests in the Congress "[a]ll legislative powers." The Executive may not alter that power and force the Legislature to act to preserve a legislative program from extinction prior to the time that Congress has declared it shall terminate.

Guadamuz, supra, at 1241 (emphasis added).

Thus, legal precedent supports the common sense proposition that when Congress enacts a statute creating a program and makes funds available for the establishment and maintenance of that program, Congress intends what it says -- that in fact the program will be set up and the available money expended. Therefore, it must be presumed that when Congress enacted the operating subsidy provisions of Section 236 and provided for the payment of subsidies from the reserve fund and from contract authority, it intended that, in fact, the Secretary of HUD would implement the operating subsidy program and would make additional assistance payments for operating subsidies. As tenants demonstrate infra and as the District Court found the Secretary has not and cannot

satisfy her burden. To the contrary, the text, organization, and objectives of the operating subsidy program, as well as subsequent legislative action, all compellingly demonstrate a congressional mandate that the program be implemented.

B. The Secretary's Refusal to Make Additional Assistance Payments for Operating Subsidies Violates the Mandatory Language of Section 236 and The Intent of Congress.

In providing that additional assistance payments for operating subsidies are to be made to project owners from the reserve fund in sums up to the amount that costs of property taxes and utilities have increased above the "initial operating expense level," Congress set two basic conditions precedent to the implementation of the program -- the establishment of the reserve fund and the setting by the Secretary of initial operating expense levels for Section 236 housing projects. Compliance with both of these conditions is mandated by the plain language of Section 236. "For each project there shall be established an initial operating expense level . . ." 12 U.S.C. §1715z-1(f)(3). "[T]he initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974 shall be established by the Secretary not later than 180 days after August 22, 1974." 12 U.S.C. §1715z-1(g). "The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make

additional assistance payments . . ." 12 U.S.C. §1715z-1(g)
(emphasis added).

The use of the word "shall" in a statute clearly indicates that the legislature intends that its direction be complied with; when the Congress says the Secretary of HUD "shall" perform acts, she has no discretion to refuse to comply. See, e.g., Commonwealth of Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973), which interprets "shall" in typical fashion:

Statutory language that an official "shall" perform an act has been repeatedly held to be mandatory in nature.³² It deprives the official of discretion and makes the commanded act a duty, a ministerial act. . . .

There is no other purpose for the establishment of initial operating expense levels except as the first step in calculating the amount of the payments for operating subsidies, and it is unreasonable to assume that Congress would require the Secretary to establish initial operating expense levels for all Section 236 housing projects within 180 days unless Congress also intended that those levels be used for some purpose. The only purpose for which they can be used is to calculate the amount of additional

³²"Shall" is the language of command. 367 F. Supp., at 1381 and n.19 (citations omitted); see also, Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973); State of Oklahoma v. Weinberger, 360 F. Supp. 724 (W. D. Okla. 1973); Sioux Valley Empire Electric Association, Inc. v. Butz, *supra*; State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); State of Louisiana v. Weinberger, *supra*.

assistance payments to be made for operating subsidies.³³

The command that the reserve fund be established³⁴ is also strong evidence of Congress' intent to mandate the Secretary of HUD to pay operating subsidies. The reserve fund cannot be used at all unless it is used to make additional assistance payments for operating subsidies. The Secretary of HUD has accumulated more than \$46,000,000 in the reserve fund. (J.A.). Surely Congress intended that that money be used, and that, exactly as the statute requires, it "be used by the Secretary to make additional assistance payments" for operating subsidies. 12 U.S.C. §1715z-1(g). The Senate Committee on Banking, Housing and Urban Affairs, the Committee which authored the operating subsidy program, stated quite simply in reporting out S.3295 that:

The reserve [fund] is required under Section 236 (g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236 (f)(3). The Committee is concerned that HUD has not yet implemented this provision of the

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The Secretary's argument on this point is specious. She contends that although the statutory command in 12 U.S.C. §1715z-1 (g) that the initial operating expense level of every Section 236 project nationwide be established by a date certain is mandatory, since Congress has finally acquiesced and has approved the exercise of her discretion not to implement the program at all, that the establishment of the initial operating expense level "would have been futile." Secretary's Brief, at 27.

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Indeed, the reserve fund was first established by the Housing and Urban Development Act of 1968, P.L. 90-448, 82 Stat. 498 (1968). That legislation required that "the reserve fund was to be used to make interest reduction payments, 'subject to limits approved in appropriation Acts pursuant to subsection (i)' of 12 U.S.C. §1715z-1." Dubose v. Hills, 405 F. Supp. 1277, 1286 (D. Conn. 1975) (footnote omitted) (J.A.). The Housing and Community Development Act of 1974, however "changed both the purpose for which, and means by which, the reserve fund was to be spent." Id.

1974 Act.

S. Rep. No. 94-749, 94th Cong., 2d Sess.,
at 10 (1976) (emphasis added).

1. The Secretary does not need contract authority to spend the reserve fund.

The district courts have explicitly found that the Secretary can make direct expenditures from the reserve fund for operating subsidies without using contract authority. See, e.g., Ross v. Community Services, Inc., 405 F. Supp. 831 (D. Md. 1975); Underwood v. Hills, 414 F. Supp. 526 (D.D.C. 1976). No case has held to the contrary.

The Secretary's repetition of the claim that the reserve fund can only be used to liquidate contracts and that she cannot spend the reserve fund without contract authority, in her opening brief³⁵ and in the self-serving affidavits of HUD officials,³⁶ does not make it so.

The Secretary's primary support for her position appears to be her argument that governmental expenditures can only occur in a two step procedure -- an authorization for appropriation in one statute followed by passage of an appropriation act. Therefore, she contends 12 U.S.C. §1715z-1 (g) cannot both create the reserve fund and empower her to

³⁵ Secretary's Brief, at 5, 19, 31-36, 58-60, 62-64.

³⁶ Affidavit of Carl A. Hills, dated March 31, 1976
(J.A.); Affidavit of Thomas J. O'Connor dated March 31, 1976
(J.A.).

expend it. One authority cited by the Secretary in support of her argument that expenditures must always involve both an authorization and an appropriation is the Congressional Budget Act of 1974, 31 U.S.C. §1301, et seq.³⁷ (Secretary's Brief, at 33, n.26). However, tenants find nothing in that Act which requires a two-step procedure for governmental expenditure of money. In fact, Section 401 explicitly recognizes the existence of self-replenishing funds which provide a method for "'backdoor spending' which bypasses the regular appropriations process."³⁸ The reserve fund provides just such a method for backdoor spending outside the regular appropriations process and it can therefore be spent directly without the use of contract authority.

Courts which have considered self-perpetuating funds that do not contain Congressional appropriations have held that such funds can be accumulated and expended outside the usual budget processes. Varney v. Wareheime, 147 F.2d 238 (6th Cir. 1945), recognized that "the funds accumulated by assessment on the handlers of milk are not public funds, but are trust funds to be

³⁷ That statute does not directly affect this case because it deals only with Congressional budget processes which precede the passage of bills, and, in addition, it did not take effect "until the first day of the second regular session of the Ninety-Fourth Congress" (31 U.S.C. §1301, note) i.e., January 19, 1976 (122 Cong. Rec. Daily S.1, H.1), approximately seventeen months after enactment of the operating subsidy provisions (August 22, 1974) and twelve months after the Secretary was required to make additional assistance payments (February 18, 1975).

³⁸ Allen Schick, "The Congressional Budget Act of 1974 (P.L. 93-344): Legislative History and Analysis," Library of Congress Congressional Research Service, February 26, 1975.

retained and disbursed by the Market Agent without deposit to the Treasury of the United States." The court concluded that:

Article I, Section 9, Clause 7, of the Constitution is not pertinent to this decision. Its provision that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," relates to public funds arising from taxes, customs, etc., which are required by law to be deposited in the Treasury. The mere fact that moneys are received by federal agencies in the lawful exercise of their public functions, standing alone, does not bring them within the constitutional or statutory provision requiring all "public funds" to be covered into the Treasury and withdrawn only by an appropriation.

147 F.2d, at 245.

In Emery v. United States, 186 F.2d 900 (9th Cir. 1951), the United States sued for restitution of rent overcharges which were to be held by the government in trust for tenants. The Court, disregarding the landlords' contention that payment by the government would be unlawful because the money was not properly appropriated, held that:

This money was to be disbursed by the United States Government to the renters who were the victims of the overcharges. This money is held by the Government in trust for these tenants. Payment by the Government would not be unlawful because it was not properly appropriated. An appropriation is not involved here . . .

186 F.2d, at 902.

The reserve fund is simply another pool of money which can be spent directly by the Secretary independent of the usual appropriations process. There is no reason why the reserve fund cannot be created by, and its expenditure authorized in, one statute.

Yet the Secretary still concludes that a two-step procedure is necessary because only in that way, according to her, can Congress retain control over spending. But even the Secretary acknowledges (Secretary's Brief, at 31-33) that the two-step procedure is only the ordinary method by which Congress exercises control over expenditure of general funds from the Treasury. The reserve fund, however, is not composed of general Treasury funds and therefore the ordinary methods by which Congress exercises control over spending are irrelevant and unnecessary. Congress has retained complete control over the reserve fund by establishing a comprehensive scheme which regulates accumulation and expenditure of the reserve fund whether the fund is inadequate, sufficient, or more than adequate as described more fully below.

Moreover, Congress has expressly removed the reserve fund from appropriation limits. Before the operating subsidy provisions were enacted, 12 U.S.C. §1715z-1(g) provided that excess rental charges paid by Section 236 project owners to the Secretary would be:

. . . deposited by the Secretary in a fund which may be used by him as a revolving fund for the purpose of making interest reduction payments with respect to any rental housing project receiving assistance under this section subject to limits approved in appropriations Acts pursuant to subsection (i) of this section.

(Emphasis added).

When the operating subsidy provisions were enacted, subsection (g) was amended and the reference to appropriation limits was

deleted. Subsection (g) now provides that:

Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section.

Thus, the Secretary's argument that contract authority must be used to expend the reserve fund since governmental spending requires a two-step process involving authorization and appropriation, is incorrect. The reserve fund is a self-replenishing fund, outside the usual appropriations process, which does not contain general tax revenues, and which can be spent directly without the usual restrictions placed on expenditures from the Treasury.

The Secretary nonetheless claims that her administrative interpretation of Section 236 to require her to use contract authority to spend the reserve fund is entitled to great deference. Secretary's Brief, at 63. In support of that claim she relies primarily on Udall v. Tallman, 380 U.S. 1 (1965), which is readily distinguishable. In that case, deference was given to a long standing administrative interpretation of executive orders which had been a matter of public record, on which third parties had relied in making substantial expenditures of funds, and which the court found to be a reasonable interpretation of the executive orders. This is not such a case. The administrative interpretation of Section 236 that spending the reserve fund requires use of contract authority has only become public record through the affidavits of HUD officials, filed in operating subsidy cases. There is no evidence that HUD ever considered

this problem in the past, prior to suit, or that third parties have relied on the Secretary's interpretation of that statute. But most importantly, as the District Courts which have ordered payment of operating subsidies directly from the reserve fund have recognized, the Secretary's interpretation conflicts with the operating subsidy provisions of Section 236. Since her interpretation is unreasonable and contrary to the statute and legislative intent, it is entitled to no deference. See, Morton v. Ruiz, 415 U.S. 199 (1974), and Espinoza v. Farah Mfg. Co., 414 U. S. 86 (1973), cited with approval in Ross, supra, 405 F. Supp., at 835.

Congress has recently expressly recognized that the reserve fund is separate from and in addition to the Secretary's contract authority. See, the report of the Senate Committee on Banking, Housing and Urban Affairs, dated April 12, 1976.

The Committee was informed that there is approximately \$125 million in unused authority available to provide interest subsidies and operating assistance and, in addition, approximately \$44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act.

S. Rep. No. 94-749, 94th Cong.,
2d Sess., at 10 (1976) (emphasis added).

The operating subsidy provisions state simply that the

Secretary is to "make and contract to make"³⁹ operating subsidy payments and that the reserve fund is "to be used to make" those payments. 12 U.S.C. §1715z-1(f)(3) and (g). There is plainly no requirement in the statute that contract authority be used to pay operating subsidies. Thus, the Secretary's extensive arguments concerning which programs she should favor -- operating subsidies, interest reduction subsidies, deep subsidies -- in utilizing her contract authority are simply irrelevant. She can pay operating subsidies directly from the reserve fund without interfering with those other programs.

2. Even if the Secretary must use contract authority to pay operating subsidies, she has abused her discretion by refusing to use any contract authority for that purpose.

The Secretary herself asserts that the interest reduction subsidy program is not mandatory, yet she has decided to use her contract authority for interest reduction payments rather than operating subsidies. The prior Secretary of HUD decided, after an exhaustive study, that the interest reduction program was counterproductive and unsalvageable, and the court found that Congress had concurred in that decision. See, Commonwealth of Pennsylvania v. Lynn, 163 U. S. App. D. C. 288, 501 F.2d 848

³⁹ If Congress had intended that operating subsidy payments could be made only pursuant to contracts, it would have required the Secretary to "contract to make and to make" payments rather than having the word "make" precede "contract to make," so that the sequence of the statutory command would parallel the sequence of the Secretary's actions.

(D. C. Cir. 1974), discussed below. It defies reason to assert that the Secretary is rationally using her discretion to allocate contract authority when she allocates the bulk of her Section 236 contract authority to a program that has been found discretionary and unworkable.

The Secretary justifies her decision to use contract authority for the interest reduction, or "production," subsidy by attributing to Congress a nonexistent preference for the production subsidy. The Secretary cannot twist general Congressional directives to meet the housing needs of low-income persons, such as that contained in S. Rep. No. 93-1255, into a mandate to emphasize housing production and ignore operating subsidies. Housing needs of low-income people are not met by the production of new housing projects which those people cannot afford because rents are excessive due to escalating, unsubsidized operating costs.

Even assuming that the deep subsidy program is mandatory,⁴⁰ and valuable, it is an abuse of discretion for the Secretary to fully fund deep subsidies and provide no operating subsidies.

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In fact, it appears that some of the deep subsidy payments which the Secretary is making are for projects assisted under a contract executed prior to the effective date of the deep subsidy provisions. See, Affidavit of Carla A. Hills dated May 7, 1976 (J.A.). Payment of subsidies to such projects is optional, not mandatory, since 12 U.S.C. §1715z-1(f)(2) provides for deep subsidies only in projects made subject to a Section 236 contract after August 22, 1974. It is an abuse of discretion to favor such optional deep subsidies over mandatory operating subsidies.

Some reasonable allocation of funds is called for.

Despite the fact "that the overall thrust of [the] statute is not optional," Dubose v. Hills, 405 F. Supp. 1277, 1283 (D. Conn. 1975), the Secretary in the District Court and in this Court seizes on the language in subsection (f)(3) that she "is authorized to make, and contract to make, additional assistance payments" and argues that this proves that she is not compelled to implement the program. She asserts that this is particularly clear when that language is compared with the substantially identical language of the production subsidy program in 12 U.S.C. §1715z-1(a) ("the Secretary is authorized to make, and to contract to make"), because, she contends, her suspension of that program was upheld in Commonwealth of Pennsylvania v. Lynn, supra. The Secretary also seeks to contrast the operating subsidy language with the language of the so-called "deep subsidy" program in 12 U.S.C. §1715z-1(f)(2) ("the Secretary shall make, and contract to make"), which the Secretary has determined to be mandatory. The courts have unanimously and correctly found these arguments to be unconvincing.

To begin with, the language of subsection (f)(3) that the Secretary is "authorized to make and contract to make" operating subsidy payments by itself can prove nothing, since "in ascertaining legislative intent, the entire statute, as well as its purpose must be considered." Sioux Valley Empire Electric Ass'n, Inc. v. Butz, 367 F. Supp. 686, 694 (D. S. C. 1973), aff'd, 504 F.2d 168 (8th Cir. 1974) (rejecting an argument by the Government

based on permissive statutory language that the Administrator is "authorized and empowered" to make certain loans). See also, e.g., Parker Square Tenants Ass'n v. HUD _____ F. Supp. _____, _____ (W. D. Mo. 1976), (included as Exhibit G in the Supplement) ("use of the word 'authorized' must be read in the context of the entire section"). And here consideration of the statute as a whole, expecially when coupled with its objectives, leaves no doubt that Congress created a mandatory program.

[T]he Secretary under Section 236(f)(3) has the discretion to determine whether a particular increase in the cost of utilities or real estate taxes is reasonable and is comparable to cost increases affecting other rental projects in the community. But Congress hardly intended to give the Secretary blanket discretion to frustrate Congressional policy and in effect adopt a different policy . . .

Ross v. Community Services, Inc., 405 F. Supp. 831, 834 (D. Md. 1975).

In short, the "authorized" language of subsection (f)(3) merely grants the Secretary limited discretion in making the determinations required by the statute for the payment of operating subsidies, not wholesale discretion to refuse to implement the program altogether.⁴¹ Accord, Dubose v. Hills, supra, 405 F. Supp., at 1284 (J.A.).

The Secretary, relying on Lynn, argues that when Congress

⁴¹For this reason the statement in the legislative history of Section 212 that "the Secretary would be authorized to provide additional assistance payments," S. Rep.No. 93-693, 3 U.S. Code Cong. & Admin. News 4304 (1974), adds nothing to the Secretary's position. Dubose v. Hills, supra 405 F. Supp., at 1283 (J.A.); Parker Square Tenants Ass'n v. Hills, supra (Exhibit G in the Supplement).

"authorized" her to pay operating subsidies, it intended to give her discretion to refuse to implement the operating subsidy program because "authorized" was interpreted in Lynn to confer discretion and because Congress must have intended the word "authorized" to mean the same thing in both statutes. However, the Court in Lynn did not interpret the word "authorized" as a grant of discretion. The decision in Lynn was instead based on an examination of the entire statute and of all of its legislative history. And, in fact, the bill creating the operating subsidy program had already been reported on by the responsible Senate and House Committees before the Court's decision was issued in Lynn. See, 3 U. S. Code, Cong. & Admin. News, at 4273 (1974). When those committees were considering the bill, they had before them only the opinion of the District Court in Lynn, which had held that the interest reduction program was mandatory, not discretionary. Therefore, it can hardly be concluded that in using the word "authorized" in the operating subsidy program, Congress intended to confer the discretion on the Secretary which was recognized in Lynn on appeal.

Nor does a comparison of the language of subsection (f)(3) with that of subsection (f)(2) of the statute in any way alter this conclusion. The deep subsidy program established in subsection (f)(2) does not condition the award of additional assistance payments on any eligibility determinations similar to those required under the operating subsidy program; the Congressional direction that the Secretary "shall" make and

contract to make deep subsidy payments is therefore entirely appropriate.

Likewise, a comparison of the language of the production and operating subsidy provisions hardly sustains the Secretary's position. Since Lynn, supra, 501 F.2d, at 854, does not rest on an interpretation of the "authorized" language in the production subsidy provisions of Section 236, it is baseless for the Secretary to support her present claim of discretion on the use of similar language in subsection (f)(3). In fact, the Court specifically recognized in Lynn that a mandatory program might be couched in permissive language because, as in the case of the operating subsidy program, it is "to be administered by the Secretary's entering into contracts not specifically identifiable at the time of enactment." Id. (footnote omitted).

The Secretary primarily relies on Commonwealth of Pennsylvania v. Lynn, supra, as authority for the proposition that she has discretion to refuse to implement the operating subsidy program. However, in that case the Court recognized only a very narrow discretion⁴² to refuse to continue programs which the Secretary, after an extensive study, had found to be unworkable and counter-productive in operation, unsalvageable by reforms in administration of the programs, and which were operating in a manner that contravened Congressional goals in enacting those

⁴² "[T]he discretion vested in the Secretary is a narrow one, and the potential for mischief in the event of its abuse great. . . ." 501 F.2d, at 862.

programs. Pennsylvania v. Lynn is readily distinguishable from this case. In Lynn, the Secretary was allowed to terminate the interest reduction program after an exhaustive study proved the reasonableness of that decision; here the Secretary has acted without any study of the merits of the operating subsidy program. In Lynn, Congress gave the Secretary discretion to do long range planning and to modify the interest reduction program based on the results of that planning; here there is no such grant of discretion. In Lynn, the interest reduction program was found to be counter-productive because it was designed to benefit low-income people by providing low-cost housing, but instead it caused high costs and high rents and encouraged landlords to rent to middle income tenants by providing higher subsidies for such persons; here the operating subsidy program would do precisely what it was intended to do -- reduce rents by subsidizing increased operating costs.⁴³ In Lynn, the interest reduction program was found to have inherent structural defects which made it actuarially unsound and impossible for the Secretary to administer in a manner consistent with Congress' intent to benefit low-income

⁴³ After the Secretary terminated the interest reduction program, Congress enacted the deep subsidy and operating subsidy programs in order to counteract the inherent tendency of the interest reduction program to discourage project owners from renting to low income people. As the Court recognized in Lynn, project owners tended to rent to people who could afford future rent increases based on increased operating costs. Operating subsidies would encourage project owners to rent to lower income tenants since rent increases would be subsidized. Thus, even if Lynn recognized limited discretion in the Secretary, the Secretary has abused that discretion in this case by refusing to pay operating subsidies.

tenants; here the Secretary has made no claim that the operating subsidy program could not be administered in a way that would reduce rents. In Lynn, the interest reduction program in operation conflicted with Congressional goals in enacting that very program; here the Secretary does not deny that the operating subsidy program would do what Congress intended -- reduce rents -- but instead claims only that payment of operating subsidies would interfere with the implementation of other programs which she prefers. See, Affidavit of Carla A. Hills dated March 31, 1976 (J.A.).

Thus, Congress intended that the operating subsidy provisions remedy the problem of escalating operating costs and keep rents at a level that low-income tenants could afford. The Secretary's refusal to make additional assistance payments for operating subsidies is directly contrary to the intent of Congress in enacting the operating subsidy provisions of Section 236.

The fact that Congress established a comprehensive scheme for expenditure of the reserve fund is further evidence that Congress did not intend for the Secretary to amass and refuse to spend large sums of money in the reserve fund. Rather, Congress intended that the reserve fund be expended pursuant to the scheme it had established. That comprehensive plan for the use of the reserve fund provides both for the contingency that the fund will not be sufficient to cover all operating subsidies and for the contingency that the fund will be more than adequate to pay operating subsidies.

Congress anticipated and provided for the possible insufficiency of the reserve fund by authorizing an additional source of funding for operating subsidy payments. After the passage of the operating subsidy provisions, Congress specifically provided that the Secretary of HUD could utilize her contract authority to make payments for operating subsidies. The Senate Committee on Appropriations stated: ". . . [T]he Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects." S. Rep. No. 93-1255, 93rd Cong., 2d Sess., at 8 (1974). The joint explanatory statement of the Committee on Conference is in accord with the Committee on Appropriations' statement of intent quoted above. See, H. Rep. No. 93-1503, 93rd Cong., 2d Sess., at 5 (1974).

Congress further provided for the contingency that the reserve fund and available contract authority would still not be adequate to offset all increases in property taxes and utilities for all Section 236 projects. The amount of additional assistance payments for operating subsidies is set by Congress as "an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level" 12 U.S.C. §1715z-(f)(3) (emphasis added). Thus, Congress intended that the Secretary pay additional assistance payments for operating subsidies to benefit low-income tenants, to the extent possible, "up to" the total amount of the increased operating costs in Section 236 projects. See, Ross v. Community Services, Inc., 405 F. Supp.

831, 836 (D. Md. 1975), in which the Court recognized the power of the Secretary to apportion available funds and pay operating subsidies on a pro rata basis. Accord, Underwood, supra, at 531-532; Battles Farm Co., supra, at 526.

The comprehensive scheme for the use of the reserve fund also provides for the contingency that the amount of the reserve fund will exceed the sum necessary to pay operating subsidies to all qualified Section 236 projects. When the balance in the reserve fund is more than adequate to make the "additional assistance payments" for operating subsidies, excess rental charges subsequently paid into the reserve fund are to be credited to the appropriation authorized by 12 U.S.C. §1715z-1(i) and made available until the end of the following fiscal year to make "assistance payments" (i.e., interest reduction payments) on behalf of Section 236 housing projects.⁴⁴

⁴⁴ The terms "assistance payments" and "additional assistance payments" have distinct and different meanings. Throughout the statute, "assistance payments" is used to mean interest reduction payments. 12 U.S.C. §1715z-1(b). Also, in the legislative history, the term "assistance payments" is consistently used to identify the interest reduction payments. Compare the language of 12 U.S.C. §1715z-1(c) defining the interest reduction payment with the language of Senate Report 93-693 defining the assistance payment in identical terms. S. Rep. 93-693, 93rd Cong. 2d Sess. (1974), 3 U.S. Code Cong. & Admin. News 4374 (1974). Throughout the statute, the term "additional assistance payments" is used to refer to payments in addition to the "assistance payment." See, 12 U.S.C. §§1715z-1(f)(2) and (f)(3).

The tenants have moved to clarify the contrary interpretation of the District Court in Dubose as to the operation of the reserve fund. See note 23, supra.

. . . During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section

12 U.S.C. §1715z-1(g) (emphasis added).

Congress' creation of this elaborate scheme for the expenditure of the reserve fund, both when it is insufficient to cover all additional assistance payments for operating subsidies and when it is more than sufficient to make such payments, is strong evidence that Congress intended to require the Secretary to actually spend the reserve fund for the purposes for which it was designed. Congress most definitely did not intend that the Secretary amass large sums in the reserve fund and refuse to spend the fund, thereby denying low-income tenants the benefits Congress conferred on them.

The only conclusion which can reasonably be drawn from the language of the statute, the legislative history, and the scheme for expenditure of the reserve fund, is that Congress mandated the Secretary of HUD to make additional assistance payments for operating subsidies to cover increased costs of property taxes and utilities in Section 236 projects so that those increased costs would not be passed on to low-income tenants.

Every court in which this issue has been raised, including the District Court below, has found that implementation of the operating subsidy provisions of 12 U.S.C. §§1715z-1(f)(3) and (g)

is mandatory. See, Ross v. Community Services, Inc., 396 F. Supp. 278 (D. Md. 1975), 405 F. Supp. 831 (D. Md. 1975); Dubose v. Hills, 405 F. Supp. 1277 (D. Conn. 1975); Harrison v. Hills, ____ F. Supp. ____, CV No. 75-938 (W. D. Pa. 1975); Campbell v. United States Department of Housing and Urban Development, ____ F. Supp. ____, CV No. 75-471 (N. D. Ohio 1975); Abrams v. Hills, ____ F. Supp. ____, CV No. 75-3009-JWC (C. D. Cal. 1975); Parker Square Tenants Association v. The Department of Housing and Urban Development, ____ F. Supp. ____, CV No. 75-CV577-W-3 (W. D. Mo. 1976); Carberry v. Hills, ____ F. Supp. ____, CV No. 76-521-F (D. Mass. 1976); Gertsch v. Hills, ____ F. Supp. ____, CV No. C-75-513 (D. Utah 1976); Battles Farm Co. v. Hills, 414 F. Supp. 521 (D. D. C. 1976); Underwood v. Hills 414 F. Supp. 526 (D. D. C. 1976).⁴⁵ In addition, on February 12, 1976 a preliminary injunction was granted orally ordering implementation of the operating subsidy program in Folsom Gardens Action Committee v. Hills, ____ F. Supp. ____, CV No. S-76-43-TJM (N.D. Cal. 1976).

Thus, all judicial precedents are in accord with tenants' position that the Secretary, in refusing to pay operating subsidies, is violating her mandatory statutory duty. The fact that the Secretary has failed to appeal from the issuance of the initial preliminary injunctions issued in December, 1975, in these cases substantially diminishes her claim that the District

⁴⁵ Copies of all unreported decisions are included in full as Exhibits in the Supplement except for the decision in Campbell.

Court "committed a clear mistake of law" in its interpretation of the operating subsidy program.

- C. The Legislative Objectives of the Program Amply Support the Interlocutory Decision of the District Court that the Operating Subsidy Program is a Mandatory One.

The legislative goals underlying Section 212 underscore the message of the provision's language and organization. Section 236 was enacted in 1968 expressly "[f]or the purpose of reducing rentals for lower income families. . . ." 12 U.S.C. §1715z-1(a). In view of mounting operating costs that were endangering the viability of many projects, the Senate Banking, Housing and Urban Affairs Committee proposed the 1974 amendments to Section 236 specifically "to prevent excessive rent increases and assist sponsors [project owners] in meeting increases in operating costs beyond their control. . . ." S. Rep. No. 93-693, 3 U.S. Code Cong. & Admin. News 4302 (1974).

The Committee explained:

The Committee was concerned with the problem experienced by projects where [operating] costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus

be required to pay far more than 25 percent of their incomes for their apartments.

Id., at 4303.⁴⁶

On the basis of this legislative history the court in Parker Square Tenants Ass'n v. HUD, supra, correctly concluded:

[These] statements reflect the congressional expectation that the Secretary would implement the program to alleviate the burden caused by rising property taxes and utilities in a manner which should foster efficient management.

(Emphasis added).

Indeed, for the Secretary to amass and leave idle millions of dollars in the excess rental reserve fund (J.A.) and also ignore entirely the operating subsidy program in

⁴⁶The House Committee on Banking and Currency similarly observed:

One of the problems with the Section 236 rental assistance program is that the amount of the subsidy is fixed for forty years. Thus as real estate taxes and other operating costs increase at a rate faster than the incomes of tenants, rents must be increased until at some point the project becomes economically unfeasible, vacancies mount, and the project fails.

H. R. Rep. No. 93-1114, 93d Cong., 2d Sess., at 21 (1974); see also, DuBose v. Hills, supra, 405 F. Supp., at 1287 & n.51 (Congressional hearings on problems arising from increased operating costs) (J. A.).

The findings below confirm that the plaintiffs would suffer irreparable harm were the Secretary not ordered to implement the operating subsidy program. Dubose, supra, 405 F. Supp., at 1292 and n.74 (J. A.); accord, Underwood, supra, at 530-531. In Battles Farm Co., supra, 414 F. Supp., at 527, Judge Pratt also found that Section 236 project owners are suffering irreparable harm since low-income tenants cannot afford to bear these increased operating cost and project owners risk foreclosure of their mortgages.

allocating available contract authority (id.) does not merely subvert the purposes of Section 236, as amended, but defies common sense. The Secretary has submitted an affidavit in this case acknowledging that "[t]he operating subsidy amendments were enacted to alleviate the financial hardships, generated by escalating utility rates and tax increases, which threaten the owners of HUD subsidized, multi-family projects and the tenants residing in those projects" (J.A.). These problems have been so severe that, having declined to implement the operating subsidy program HUD has been forced, in the Secretary's words, to "[consider] a number of alternative solutions . . . and has begun to implement some of them" including, for example, a "moratorium" on foreclosures and the allocation of so-called Section 8 subsidies to needy projects (J.A.).⁴⁷ Since these are the very problems that led Congress to enact the 1974 amendments to Section 236, it is simply absurd for the Secretary to suggest that Congress contemplated that she could lawfully refuse to provide operating subsidies. Cf., Sioux Valley Empire Electric Ass'n, Inc. v. Butz, 504 F.2d 168 (8th Cir. 1974). As the Court emphasized in Ross, supra:

It is not HUD's prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not.

⁴⁷ Under Section 8 of the United States Housing Act of 1937, as added by Section 201(a) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f, the Secretary is authorized to make assistance payments each month to existing housing projects for each rental unit.

The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch.

396 F. Supp., at 286; 405 F. Supp., at 835.⁴⁸

Plainly, Congress intended that this program would be implemented.

- D. Legislative Action Subsequent to Enactment of the Operating Subsidy Provision in the 1974 Act Confirms the Mandatory Nature of the Program and Congressional Concern over the Secretary's Failure to Implement It.

Given the stream of district court decisions beginning with Ross v. Community Services, Inc., 396 F. Supp. 278 (D. Md. 1975), that have unanimously ordered implementation of the operating subsidy program, Congress could reasonably have relied upon the courts for correction of the Secretary's default in providing

⁴⁸ Acknowledging that "tallying the 'shall's' and 'may's'" is not always determinative, Dubose, supra, 405 F. Supp., at 1284 (J. A.); Lynn, supra, 501 F.2d, at 854, Judge Blumenfeld, like Judge Harvey in Ross concluded:

The Secretary asserts that she is not even required to make a determination of the initial operating expense levels, despite the statute's apparently mandatory language and explicit compliance deadline. The Secretary is wrong about that. The mandatory nature of the clause, the inclusion of the compliance deadline for existing projects, and the adoption of the program in response to a specific need, convince me that Congress intended that the Secretary implement this program and do so quickly.

Dubose, supra, 405 F. Supp., at 1284 (J. A.).

operating subsidies.⁴⁹ But, in fact, since enactment of Section 212, Congress has repeatedly confirmed that these subsidies must be paid.

First, although Congress initially declined to release any contract authority for operating subsidies, see, H. Conf. Rep. No. 93-1310, 93d Cong., 2d Sess., at 6 (1974), it is undisputed that Congress promptly reversed this position in enacting the Supplemental Appropriations Act, 1975, Pub. L. 93-554. In reporting out this legislation on October 9, 1974, the Senate Appropriations Committee "[clarified] the intent . . . with respect to the use of operating cost subsidies for Section 236 projects" by stating "that the Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects." S. Rep. 93-1255, 93d Cong., 2d Sess., at 8 (1974) (emphasis added). The conference committee expressly agreed to this "clarifying intent." H. Conf. Rep. No. 93-1503, 93d Cong., 2d Sess., at 5 (1974). As a result of this action, the Secretary effectively had, according to the affidavits submitted below, almost \$91 million in contract authority as of

⁴⁹ Of course, "the failure of Congress to act in the brief period since [the 1974] amendments became law" would hardly "suggest that Congress has concurred in the administrative interpretation which HUD has accorded this statute. As the court observed in Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 861 (D. C. Cir. 1974), "Congress 'cannot be put to the necessity of acting twice before it is taken to mean what it said in duly enacted legislation.'" Ross v. Community Services, Inc., supra, 405 F. Supp., at 835. Accord, Dubose v. Hills, supra, 405 F. Supp., at 1291 (J.A.).

September 30, 1975 (J.A.), and almost \$40 million as of February 20, 1976 (J.A.), available for operating subsidies as well as for production and deep subsidies.⁵⁰ Congress must have contemplated that substantial amounts of this contract authority would, in fact, be used for operating subsidies, since at the time Congress made contract authority available for that

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In view of the Secretary's continuing and adamant refusal to implement the program except where required to do so by court order, these amounts of unobligated contract authority should be compared with the understanding of the Senate Committee on Banking, Housing and Urban Affairs, the committee which authored the operating subsidy program. On April 12, 1976, in reporting out S. 3295 which became P. L. 94-375, 90 Stat. 1067, (August 3, 1976), entitled "The Housing Authorization Act of 1976," and which, inter alia, extended the life of the Section 236 program until September 30, 1977, the Committee stated:

Section 4 of the bill would extend the termination date of Section 236 of the National Housing Act from June 30, 1976 until September 30, 1977.

No additional authorization is provided in the bill. The Committee was informed that there is approximately \$125 million in unused authority available to provide interest subsidies and operating assistance
. . . .

S. Rep. No. 94-749, 94th Cong., 2d Sess.,
at 10 (1976).

purpose HUD had generally suspended both the production⁵¹ and deep⁵² subsidy programs. Without those programs in full force and effect contract authority previously released by Congress obviously would have to be used instead for operating subsidies.

Similarly, on April 12, 1976, the Senate Committee on Banking Housing and Urban Affairs stated in reporting out legislation to extend the life of the production subsidy program from June 30, 1976, until September 30, 1977:⁵³

"The reserve [fund] is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act."

S. Rep. No. 94-749, 94th Cong., 2d Sess., at 10 (1976) (emphasis added).

⁵¹ Beginning in January, 1973, HUD suspended entering into new production subsidy contracts, except pursuant to certain commitments previously extended. Commonwealth of Pennsylvania v. Lynn, supra, 501 F.2d, at 851 nn. 6 & 10. The Court upheld this action in Lynn, noting that Congress had at most questioned the wisdom of the suspension and not its legality. See, 501 F.2d, at 857-861. In the same vein Congress expressly declined to "[mandate] use of funds for" production subsidies after the decision in Lynn when it "clarified" its intent concerning the use of contract authority for operating subsidies. H. Conf. Rep. No. 93-1503, supra.

⁵² Since deep subsidies are provided to projects contracted for after August 22, 1974, 12 U.S.C. §1715z-1(f)(2), suspension of the production subsidy program before that date effectively suspended the deep subsidy program as well.

⁵³ The Senate bill, S.3295, was signed into law on August 3, 1976. Housing Authorization Act of 1976, Pub. L. 94-375, 90 Stat. 1067. Section 4(a) of this law amends 12 U.S.C. §1715z-1(n) to continue the Secretary's power to insure new mortgages until September 30, 1977.

This statement by the committee that authored the operating subsidy program and is charged with overseeing its implementation confirms that Congress meant the excess rental reserve fund, in addition to available contract authority, to be used for operating subsidies.

Congress has only recently provided further evidence of its intent by deciding against a "rescission bill" that would acquiesce in HUD's impoundment of operating subsidy funds. The Comptroller General on April 20, 1976, reported to Congress, pursuant to the Impoundment Control Act of 1974, 31 U.S.C. §1400, et seq., that HUD was refusing to use the reserve fund for operating subsidies (a copy of that report is included as Exhibit F in the Supplement). Since Congress declined to enact a bill rescinding this budget authority within forty-five days of continuous congressional session after receipt of this report, Section 1012(b) of the Impoundment Act, 31 U.S.C. §1402(b), unequivocally requires that the reserve fund now be made available for obligation, independently of HUD's responsibilities to use the fund under 12 U.S.C. §§1715z-1(f)(3) and (g).⁵⁴ See, H. R. Doc. 94-558, 94th Cong., 2d Sess. (1976) (communication from the Comptroller General, reproduced as Exhibit E in the Supplement).

⁵⁴ Section 1012(b) states that "[a]ny amount of budget authority proposed to be rescinded . . . shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded" 31 U.S.C. §1402(b).

Finally, "The Housing and Urban Development and Independent Agencies Appropriation Act, Fiscal Year 1977," Pub. L. 94-378, 90 Stat. 1095 (August 9, 1976), corroborates the Secretary's obligation to pay operating subsidies. The House Appropriations Committee proposed a provision to reduce the requirements for housing payments for fiscal year 1977 by making the excess rental reserve fund available for a variety of programs in addition to Section 236 subsidies. See, H. R. Rep. No. 94-1220, 94th Cong., 2d Sess., at 7 (1976). The House committee evidently was prepared to let HUD use the reserve fund in its discretion for any number of housing programs, including the operating subsidy program, but only so long as the money would in fact be spent.⁵⁵ The committee's overriding concern was that the reserve fund not be allowed to lie pointlessly unused.

The Senate concurred in this objective, but refused to sacrifice the operating subsidy program in the process. On the Senate floor Senator Sparkman offered an amendment to strike the House's language on the following grounds:

HUD has failed to carry out [the operating subsidy program] despite the specific legislative authority conferred 2 years ago, despite the fact that almost \$25 million in

⁵⁵ The committee's language that excess rental charges "shall be available . . . for . . . payments" indicates congressional intent that these charges in fact be expended. See, 31 U.S.C. §1402(b) (quoted in note 54, supra); State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099, 1110-11 n.15 (8th Cir. 1973).

excess charges have been returned to HUD,⁵⁶ and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.

[In addition,] the General Accounting Office has informed HUD that the accumulated section 236 funds are covered by the Impoundment Control Act, and that, in the absence of a [rescission] approval by the Congress, these funds must be obligated in accordance with the provisions of the 1974 act. HUD has failed to obligate the funds. I am informed that the GAO is now considering legal action in order to require HUD to follow the requirements of the Impoundment Control Act.

Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized

⁵⁶This figure approximates the amount left in the reserve fund after HUD's proposed refund of alleged overpayments to the fund by project owners. See, note 25, supra. It should be noted that Transmittal No. 24 was promulgated on June 6, 1975, a mere two weeks after a preliminary injunction was issued in Ross, supra, 396 F. Supp. 278. Effective September 1, 1975, Transmittal No. 24 changed the method by which Section 236 project owners are to compute excess rentals which are sent to the Secretary for deposit into the reserve fund in a manner that diminishes the amount of these contributions. Subsequently, in December, 1975, HUD promulgated a new regulation raising the income limits of Section 236 projects as its "solution" to the sharp increase in operating costs. See, 24 C.F.R. §236.72, 40 Fed. Reg. 52844-45 (1975), cited in Dubose, supra, 405 F. Supp., at 1288 n.52 (D.A.). Finally, at depositions in the cases below in April, 1976, tenants' counsel were given a copy of a written opinion written by HUD's General Counsel on January 15, 1976, in which he concluded that Transmittal No. 24 should be implemented retroactively to 1968 which would result in the refund of an estimated \$18 million to Section 236 project owners from the reserve fund. The opinion was written one month after the initial preliminary injunctions in the instant cases.

under section 236(g).

122 Cong. Rec. S10775 (June 26, 1976, daily ed.) (a copy of which is included as Exhibit L in the Supplement).

Senator Proxmire, floor manager for the bill concurred that "[i]t is most important that we do our very best to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people." Id. Senator Sparkman's amendment then carried unanimously.

In conference committee the Senate agreed to have the House provision restored, but only on the express understanding "that this action shall not prejudice any suit now or hereafter before the courts in this area." H. Conf. Rep. 94-1362, 94th Cong., 2d Sess., at 5; 122 Cong. Rec. H-7685 (1976) (a copy of which is included as Exhibit M in the Supplement). As a result, HUD has been ordered yet once again to spend the monies in the reserve fund. Although this most recent directive is formally without prejudice to whether those monies be spent for operating or some other subsidy, the mere fact that Congress has found it necessary to issue another directive is evidence of Congress's impatience and desperation at HUD's failure to use

the reserve fund.⁵⁷ The 1977 appropriations act thus underscores the senselessness of HUD's refusal to expend the revenues in the reserve fund for operating subsidies when those monies have now been available for that purpose for two entire years.

Tenants' position on the new legislation has been adopted in a strong opinion by Judge Blumenfeld below. Dubose v. Hills, ____ F. Supp. ____, Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction (D. Conn. Sept. 27, 1976) (a copy of which is included as Exhibit B in the Supplement). Therein, the Secretary's motion, based solely upon the enactment of P.L. 94-378, was denied after oral argument on September 13, 1976, and the submission of briefs by both parties.

In this Ruling Judge Blumenfeld reaffirmed his rulings of December 15, 1975, 405 F. Supp. 1277 (J. A.), and of May

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Stronger evidence of Congressional disenchantment with HUD's handling of the subsidized housing program is found in S. Rep. No. 94-326, which accompanied the 1976 HUD Appropriations Act. In that report, the Committee on Appropriations notes:

The Committee has concurred with the House in making significant cuts in several of the Department's salary and expense accounts. The Committee believes that too often departmental personnel have been used to obstruct rather than carry out directives of the Congress. Examples are the refusal to fully implement the Section 202 program for the elderly, the inability to come up with regulations for the Section 802 State Housing Finance and Development Agency Program, the failure to deliver the housing goals report on schedule, the refusal to attempt to meet the housing goals, and the continuing effort to kill the Sections 235 and 236 programs.

S. Rep. No. 94-326, 94th Cong. 1st Sess., at 11-12 (1975) (emphasis added).

27, 1976 (J. A.), in stating that "the issuance of the preliminary injunction was premised upon this Court's conclusion that the implementation of the [operating subsidy] program and the expenditure of the reserve fund for operating subsidies was mandated by the statute." Ruling, at 5 (Exhibit B in the Supplement). Moreover, after a careful review of the legislative history of P.L. 94-378 in an effort to ascertain Congressional intent behind the statutory "proviso"⁵⁸ in that legislation concerning use of the reserve fund, 12 U.S.C. §1715z-1(g), the District Court held:

I conclude that there is no basis for altering my holding that the Secretary is under a mandatory duty to implement the operating subsidies program.

Ruling, at 10.

This holding conclusively rejected the Secretary's assertions about P. L. 94-378, the necessity of contract authority for use of the reserve fund, and her discretion to implement the operating subsidy program.

Relying upon the express caveat in the conference committee

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After appropriating \$2,975,000,000, Congress in P. L. 94-378 attached the following:

Provided, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

report, H. Rep. No. 94-1362, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. H 7685 (Exhibit M in the Supplement), the District Court below emphasized:

The legislative history makes it clear that the proviso enables the Secretary to use the 236(g) reserve fund for other than Section 236 programs. However, it also makes clear that Congress did not intend to allow the Secretary to fail to implement the operating subsidies program. The statements of Senators Sparkman and Proxmire are to this effect, as is the statement in the Conference Report that its action "shall not prejudice any suit . . . in this area".

[The Secretary, in her discretion, is free to spend the Section 236(g) funds on other programs after October 1, [1976]. However, that portion of the fund necessary to maintain a full operating subsidies program in Connecticut must be so allocated. Only in this way will the relief granted by my earlier orders not be "prejudiced".

Ruling, at 10-11 (emphasis in original) (footnotes omitted).

In his Ruling of September 27, 1976, Judge Blumenfeld also recognized that on August 31, 1976, Circuit Judges Robb and Wilkey in Underwood v. Hills, supra, had denied the Secretary's motion for a stay pending appeal after consideration of P. L. 94-378. They concluded that "the district court's order does not preclude the Secretary from using the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. §1715z-1(f)(3), to the extent such other funding is authorized in Public Law 94-378." Underwood v. Hills, Nos. 76-1603 and 76-1650 (D. C. Cir. Aug. 31, 1976) (a copy of which is included

as Exhibit N in the Supplement). Judge Blumenfeld thereby concluded:

My present ruling reaches a similar result. However, I add that such other payments can be made only if the Secretary's allocations does not "prejudice"⁵⁹ the relief granted to plaintiffs in this action.

Dubose, supra, Ruling at 11 n.15 (Exhibit B in the Supplement).⁶⁰

⁵⁹ The reference in the conference committee report to "any suit . . . hereafter before the courts in this area, H. Rep. No. 94-1362, 94th Cong., 2d Sess. (1976) (emphasis added) (Exhibit M in the Supplement) obviously refers to the intended impoundment suit by the Comptroller General against HUD. See, H. R. Doc. No. 94-558, 94th Cong., 2d Sess., at 2-3 (July 19, 1976) (Exhibit E in the Supplement).

⁶⁰ In Underwood, supra, the plaintiffs moved for clarification of the August 31, 1976 order seeking an injunction pending appeal to restrain HUD from emptying the reserve fund based upon the letter of September 20, 1976, from Rex Lee to Gerald Goldman, counsel for plaintiffs in Battles Farm Co. v. Hills, supra (a copy of which is included as Exhibit O in the Supplement). Based in part upon that letter Judges Wright and Tamm on September 30, 1976 issued a new order (a copy of which is included as Exhibit P in the Supplement) which provides in relevant part:

ORDERED by the Court that defendant-appellants are precluded from allocating monies in the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. §1715z-1(f)(3), until the assistance payments as provided in subsections (3) and (4) of the District Court's order of June 8, 1976 have been made. Defendant-appellants are not precluded by this order from making refund payments, to the extent authorized by the District Court order of June 8, 1976, and the order of this Court dated August 31, 1976.

Underwood v. Hills, Nos. 76-1603 and 76-1650 (D. C. Cir. Sept. 30, 1976).

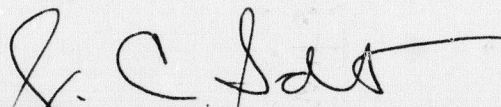
Therefore, it is clear that Congress generally intends, and specifically intended in enacting P. L. 94-378, that the enactment of subsequent legislation will in no way affect a liability which has accrued under a statute prior to its amendment by such legislation. Since the entire amount currently in the reserve fund will have to be used to pay the retroactive operating subsidies ordered by the District Court below, and by the district courts in Underwood, supra, P. L. 94-378 must be interpreted only to permit the Secretary to use, for purposes other than operating subsidies, amounts paid into the reserve fund in the future, after her liability in this case has been discharged.

CONCLUSION

Thus, because the operating subsidy program is mandatory, and there are no bars to relief for tenants, the statewide preliminary injunction of the District Court requiring the Secretary to pay prospective operating subsidies for the benefit of tenants in Connecticut should be affirmed.

DATED: October 12, 1976.

Respectfully submitted,



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C E R T I F I C A T I O N

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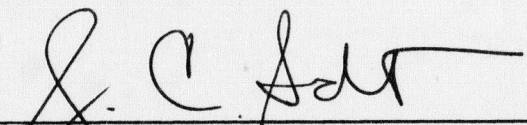
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